No. 17-1307

IN THE

Supreme Court of the United States

DENNIS OBDUSKEY,

Petitioner,

v.

MCCARTHY & HOLTHUS LLP, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are members of Congress who serve on the committees with jurisdiction over the federal financial regulatory agencies and the banking industry. By virtue of that service, *amici* are familiar with the Fair Debt Collection Practices Act (FDCPA), the reasons why Congress adopted this broad prohibition on unfair debt collection practices, and the important role that the Act currently plays in protecting consumers, including those with home mortgages, from abusive practices by debt collectors. *Amici* are thus particularly well situated to provide this Court with insight into the scope of the FDCPA, and also have a strong interest in the Act being enforced in a manner consistent with its text, structure, and purpose. A full listing of *amici* appears in the Appendix.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1975, in response to "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors," which contribute to "personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy," 15 U.S.C. § 1692(a), Congress passed the Fair Debt Collection Practices Act (FDCPA). In doing so, Congress sought to "eliminate abusive debt collection practices by debt collectors, [and] to insure that those debt

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." *Id.* § 1692(e). To achieve those ends, the FDCPA prohibits debt collectors from engaging in deceptive, misleading, harassing, or abusive practices when attempting to collect debts. The question in this case is whether non-judicial foreclosure—the process by which a trustee or other entity conducting a foreclosure [hereinafter "trustee"] takes and sells a consumer's home to fulfill an unpaid home mortgage—constitutes debt collection within the meaning of the statute. The text of the Act, and Congress's plan in enacting it, both make clear that debt collectors engaging in non-judicial foreclosure, like other debt collectors, must comply with the requirements of the FDCPA.

To start, under the plain text of the statute, non-judicial foreclosure qualifies as debt collection. A home mortgage is a debt, and non-judicial foreclosure is a means of obtaining payment of that debt. Indeed, trustees engaging in non-judicial foreclosure plainly meet the definition of "debt collector": "any person . . . who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6). Trustees use non-judicial foreclosure to collect, either directly or indirectly, the debt owed on a home. They may collect the debt directly by inducing a consumer to make overdue mortgage payments in order to avoid losing his or her home. Or they may collect the debt indirectly by following through with the foreclosure, selling the home, and using the proceeds to pay at least a portion of the debt. To be sure, a foreclosing trustee is also securing an interest in property, but that does not change the fact that the goal of foreclosure is payment of the debt.

Holding that non-judicial foreclosure is debt collection also accords with Congress's plan in enacting the FDCPA. Congress passed the FDCPA to protect consumers from abusive debt collection practices—specifically, to prevent debt collectors from engaging in deceptive, misleading, and harassing tactics in their communications with consumers. Holding that communications relating to non-judicial foreclosure are not covered by the FDCPA would undermine Congress's primary aim in passing the law. Indeed, affording protections to consumers in the foreclosure process is particularly important given the personal, familial, and financial importance individuals attach to their homes, and the added leverage these factors provide debt collectors in the foreclosure process.

Finally, although some lower courts have expressed concern that treating non-judicial foreclosure as debt collection would undermine state laws related to foreclosure, there is no basis for this concern. With respect to the potential conflicts to which lower courts have pointed, the relevant state laws can be reasonably read not to conflict with the FDCPA. Moreover, in the numerous jurisdictions in which federal and state courts have held that non-judicial foreclosure *is* debt collection, there have been no reports of difficulties enforcing both state laws and the FDCPA. Finally, even if there were an irreconcilable conflict between state laws and the FDCPA, the FDCPA explicitly preempts conflicting state laws, while also providing a mechanism for the federal government to exempt debt collectors from certain FDCPA requirements where state protections are deemed adequate. Thus, any purported conflict with state laws is no justification for construing the scope of the FDCPA more narrowly than its text and purpose require.

ARGUMENT

I. THE TEXT OF THE FDCPA DEMONSTRATES THAT THE ACT APPLIES TO NON-JUDICIAL FORECLOSURES.

The text of the FDCPA demonstrates that the Act applies to non-judicial foreclosures. Though the FDCPA repeatedly "speaks in terms of debt collection," it does not define the term. *Glazer v. Chase Home Finance LLC*, 704 F.3d 453, 459 (6th Cir. 2013); *see, e.g.*, 15 U.S.C. § 1692c(a) (prohibiting "communicat[ion] with a consumer *in connection with the collection of any debt*" in certain circumstances (emphasis added)); *id.* § 1692e (prohibiting "false, deceptive, or misleading representation[s] or means *in connection with the collection of any debt*" (emphasis added)). Despite the absence of an explicit definition, however, the plain meaning of the term "debt collection," as well as the Act's various other provisions, all make clear that the term "debt collection" encompasses non-judicial foreclosure. *See Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 476 (1994) ("In the absence of . . . a definition, we construe a statutory term in accordance with its ordinary or natural meaning.").

First, a home mortgage is a "debt." The FDCPA defines a "debt" as "*any* obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes." 15 U.S.C. § 1692a(5) (emphasis added). "[T]he word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997).

A home mortgage is an obligation to "pay money arising out of a transaction in which the . . . property

. . . which [is] the subject of the transaction [is] primarily for personal . . . purposes," 15 U.S.C. § 1692a(5), and thus plainly meets this definition. A mortgage, after all, is an obligation to pay money arising out of the sale of a home. *See Mortgage*, Black's Law Dictionary (10th ed. 2014) (defining mortgage as a "lien against property that is granted to secure an obligation (such as a debt) and that is extinguished upon payment or performance according to stipulated terms"). And a home mortgage does not cease to be a "debt" simply because a trustee initiates foreclosure proceedings. *See Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373, 376 (4th Cir. 2006) (a mortgage "'debt' remain[s] a 'debt' even after foreclosure proceedings commence[]"). Rather, a mortgage remains a debt until there is "payment or performance according to the stipulated terms." *Mortgage*, Black's Law Dictionary (10th ed. 2014).

Because a home mortgage is a "debt," initiating a non-judicial foreclosure when a debtor fails to make payments on a home mortgage is plainly an attempt to "collect[]" a debt, *e.g.*, 15 U.S.C. § 1692c(a). As this Court has explained in a different context, "[i]n ordinary English, a lawyer who regularly tries to *obtain payment of consumer debts* through legal proceedings is a lawyer who regularly 'attempts' to 'collect' those consumer debts." *Heintz v. Jenkins*, 514 U.S. 291, 294 (1995) (emphasis added). Like the legal proceedings at issue in *Heintz*, non-judicial foreclosure is clearly intended to obtain payment of a debt (the mortgage), "either by persuasion (*i.e.*, forcing a settlement) or compulsion (*i.e.*, obtaining a judgment of foreclosure, selling the home at auction, and applying the proceeds from the sale to pay down the outstanding debt)." *Glazer*, 704 F.3d at 461; *see Shapiro & Meinhold v. Zartman*, 823 P.2d 120, 124 (Colo. 1992) (en banc)

("foreclosure is a method of collecting a debt by acquiring and selling secured property to satisfy a debt").

The fact that the means of collecting the debt is the selling of the home instead of demanding payment is immaterial. "[T]he payment of money is the ultimate result of foreclosure," and the "sale of the secured property"—that is, the home—is simply a way to achieve that goal. Eric M. Marshall, Note, *The Protective Scope of the Fair Debt Collection Practices Act: Providing Mortgagors the Protection They Deserve from Abusive Foreclosure Practices*, 94 Minn. L. Rev. 1269, 1297 (2010); *see Glazer*, 704 F.3d at 463 ("the ultimate purpose of foreclosure is the payment of money"). Indeed, in most states that permit non-judicial foreclosure, including Colorado, if the proceeds of a foreclosure do not cover the outstanding debt, a creditor may seek a deficiency judgment against the debtor for the remaining balance. Marshall, *supra*, at 1274; *see Franks v. Colo. Nat'l Bank-Arapahoe*, 855 P.2d 455, 457 (Colo. App. 1993) ("The Bank is entitled to a deficiency judgment to the extent that the debt exceeds the fair market value of the property."). This fact only underscores that the goal of foreclosure is not simply to acquire and sell a home; it is to collect the debt that the mortgagor owes. Moreover, "[a]ny excess funds raised [through foreclosure] over the amount owed by the borrower . . . are paid to the borrower," *Vien-Phuong Thi Ho v. ReconTrust Co., NA*, 858 F.3d 568, 578 (9th Cir. 2017) (Korman, D.J., dissenting in part and concurring in part); *see* Colo. Rev. Stat. Ann. § 38-38-111 (West 2018), only confirming that the goal of foreclosure is to collect the debt, not to retake and resell the property. *See* Pet'r Br. 12 ("The entire point of the foreclosure is to liquidate the asset and pay the underlying debt."); *Heintz*, 514 U.S. at 294 (collecting a debt means "to

obtain payment or liquidation of it" (quoting Black's Law Dictionary 263 (6th ed. 1990))).

The court below focused on the fact that "a non-judicial foreclosure proceeding . . . only allows 'the trustee to obtain proceeds from the sale of the foreclosed property, and no more.'" *Obduskey v. Wells Fargo*, 879 F.3d 1216, 1221-22 (10th Cir. 2018) (quoting *Burnett v. Mortg. Elec. Registration Sys., Inc.*, 706 F.3d 1231, 1239 (10th Cir. 2013)). But just because a creditor would need to initiate a separate proceeding to obtain a deficiency judgment for the remaining balance of the debt does not mean that the non-judicial foreclosure was not itself an attempt to collect at least a portion of the debt. And it does not take away from the fact that merely initiating a non-judicial foreclosure could—and is often intended—to spur a consumer to pay prior missed payments to keep his or her home. Colorado provides a case in point: under Colorado law, borrowers may cure a default and avoid foreclosure by paying everything they owe up until 12 p.m. on the day of a scheduled foreclosure sale. Colo. Rev. Stat. Ann. § 38-38-104(2)(b) (West 2014). Tellingly, the court below acknowledged that if a debt collector "attempted to induce Mr. Obduskey to pay money by threatening foreclosure, the FDCPA might apply," 879 F.3d at 1222; it simply failed to recognize that initiating foreclosure is itself an attempt to induce payment.[2]

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[2] The court below suggested that the FDCPA applies only to judicial foreclosures, citing the fact that judicial foreclosures in Colorado preserve to the trustee the right to collect any deficiency left in the loan amount after the home's sale, while creditors in non-judicial foreclosures must obtain any amount of debt not covered by the home's sale through a separate deficiency action. *See Obduskey*, 879 F.3d at 1221. But as noted above, a non-judicial foreclosure is, at the very least, intended to obtain *partial* payment of the underlying debt. And more broadly, it would make little sense for the Act's protections to apply to judicial

Other provisions of the FDCPA bolster an interpretation of debt collection that includes non-judicial foreclosure proceedings. For example, the FDCPA's judicial venue clause provides that "[a]ny debt collector who brings . . . an action to enforce an interest in real property securing the consumer's obligation" shall "bring such action only in a judicial district or similar legal entity in which such real property is located." 15 U.S.C. § 1692i(a) & (a)(1). This provision assumes that those "enforcing an interest in real property" are "debt collectors."

The FDCPA's definition of "debt collector" further confirms this interpretation. Debt collector is defined as, among other things, "any person . . . who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." *Id.* § 1692a(6). Trustees initiating a non-judicial foreclosure are plainly "attempt[ing] to collect," at least "indirectly," "debts owed . . . another." After all, "a foreclosure is a method of collecting a debt by acquiring and selling secured property to satisfy a debt," so "those who engage in such foreclosures are included within the definition of debt collectors if they otherwise fit the statutory definition." *Shapiro*, 823 P.2d at 124. In fact, a non-judicial foreclosure may even be an attempt to collect a debt *directly* "because the language in the notices sent to the borrower may prompt [the borrower] . . . to exercise her rights of reinstatement or redemption by paying the arrears on the promissory note at the risk of losing the roof over her head." *Ho*, 858 F.3d at 581 (Korman, D.J., dissenting in part and

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foreclosures but not to non-judicial foreclosures, given that the latter "offer[] less protection to the consumer" and are "quicker and less expensive for the creditor," Richard D. Gage, *A Remedy Foreclosed? Mortgage Foreclosure and the Fair Debt Collection Practices Act*, 81 Fordham L. Rev. 283, 301 (2012).

concurring in part); *see* Pet'r Br. 12 ("Consumers are often left to cobble together any available funds to stave off foreclosure, and the notices [of foreclosure] serve as an obvious demand for payment.").

Nor does a secondary portion of the definition of "debt collector" affect that interpretation. After broadly defining "debt collector" to include persons who "regularly collect[] . . . , directly or indirectly, debts owed or due" another, the definition goes on to state that "[f]or the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests." 15 U.S.C. § 1692a(6). Said another way, "[o]ne who satisfies the [general definition] is a debt collector for *all* sections of the Act, but one satisfying only the [secondary definition] is a 'debt collector' limited to § 1692f(6) (concerning non-judicial repossession abuses)." *Glazer*, 704 F.3d at 463.

Respondent has suggested that this secondary definition of debt collector implies that the more general definition does not cover non-judicial foreclosures, on the theory that holding otherwise "would render meaningless the FDCPA's distinction between 'the enforcement of [a] security interest[]' and 'the collection of a[] debt[].'" Opp. 12 (quoting 15 U.S.C. 1692a(6)). But this argument misunderstands the purpose of the secondary definition, which is to make § 1692f(6) applicable to those "who engage in the business of repossessing property," even where their "business does not primarily involve communicating with debtors in an effort to secure payment of debts." *Piper v. Portnoff Law Assocs., Ltd.*, 396 F.3d 227, 236 (3d Cir. 2005). For instance, the secondary definition applies to "repossession agencies and their agents, . . . whose only role in the collection process is . . . repossess[ing] or

disabl[ing] property . . . when the debtor is not present, in order to keep the peace." *Glazer*, 704 F.3d at 464; *cf. Ho*, 858 F.3d at 583 (Korman, D.J., dissenting in part and concurring in part) (noting that a tow truck driver seizing a vehicle could constitute an enforcer of a security interest, but that a debt collector could not). Thus, for example, the secondary definition might apply to mortgage field servicing companies that perform property preservation services like inspections and lock changes, but that do not actually engage in communications in connection with the debt or attempt to secure payment of the debt. *See generally Schlaf ex. rel. Plaintiffs v. Safeguard Prop., LLC*, 899 F.3d 459, 466-67 (7th Cir. 2018).

The text of the secondary definition thus does nothing to limit the scope of the Act's broader, general definition of "debt collector." Indeed, immediately following the secondary definition of debt collector, the Act lists six explicit exceptions to the definition of "debt collector," none of which includes trustees initiating non-judicial foreclosures. *See* 15 U.S.C. § 1692a(6)(A)-(F). In short, because such trustees plainly meet the broad definition of "debt collector," their actions seeking to enforce a consumer's obligation to pay a home mortgage—including non-judicial foreclosure—should be considered "debt collection" under the Act.

II. EXEMPTING NON-JUDICIAL FORECLOSURES FROM THE FDCPA'S REQUIREMENTS WOULD CONTRAVENE CONGRESS'S PLAN IN PASSING THE ACT.

Exempting non-judicial foreclosure from the Act's requirements would not only be at odds with its text, it would also "create an enormous loophole in the Act," "immunizing any debt from coverage if that debt happened to be secured by a real property interest and foreclosure proceedings were used to collect the debt,"

Wilson, 443 F.3d at 376. This outcome contravenes Congress's plan in passing the FDCPA.

Congress passed the FDCPA in response to "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors," which contribute to "personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." 15 U.S.C. § 1692(a); S. Rep. No. 95-382, at 1696 (1977) ("abuse by third party debt collectors is a widespread and serious national problem"). Moreover, Congress found that "[e]xisting laws and procedures for redressing these injuries [we]re inadequate to protect consumers." 15 U.S.C. § 1692(b); S. Rep. No. 95-382, at 1696 (1977) ("The primary reason why debt collection abuse is so widespread is the lack of meaningful legislation on the State level."). Thus, Congress passed the Act in order to "eliminate abusive debt collection practices by debt collectors, [and] to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." 15 U.S.C. § 1692(e).[3]

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[3] Significantly, abusive practices related to foreclosure proceedings were among the offenses to which members of Congress pointed in explaining the need for this legislation. In first introducing the legislation in 1975, Representative Frank Annunzio described as inspiration a consumer's account of a letter he received threatening "the sale of [his] house," when in fact the debt collector had the wrong "lot number." 121 Cong. Rec. E5404 (daily ed. Oct. 9, 1975). Similarly, when reintroducing the bill in 1976, Representative Annunzio explained that the bill would prevent "[s]uch tactics as threatening to impound or sell a person's property." 122 Cong. Rec. H1193 (daily ed. Feb. 19, 1976). Likewise, later that year, he explained that the bill would prohibit "[p]ractices such as advertising a consumer's home for sale to scare them into paying." 122 Cong. Rec. H7177 (daily ed. July 1, 1976).

To achieve those ends, Congress designed the law to apply, subject only to limited exceptions, to "all third persons who regularly collect debt for others." S. Rep. No. 95-382, at 1697 (1977); *see supra*, Part I.[4] It prohibited these debt collectors from engaging in communications at unusual times and places, 15 U.S.C. § 1692c(a)(1), and providing false, deceptive, or misleading representations, *id.* § 1692e, and it required them to include certain basic information like the amount of the debt and the name of the original and current creditor in any notice, *id.* § 1692g(a)(1)-(2), (5).

Exempting non-judicial foreclosures from the Act would thus undermine Congress's goals in passing this legislation because abusive practices are no less a danger in the context of non-judicial foreclosure than in other debt collection contexts. In most states, a trustee initiates a non-judicial foreclosure by "provid[ing] notice of foreclosure to the debtor and publiciz[ing] the foreclosure sale." Marshall, *supra*, at 1274. Just like other notices covered by the FDCPA, notices pertaining to non-judicial foreclosure could run afoul of the Act's prohibitions, and there is nothing in the text, structure, or purpose of the FDCPA which suggests that Congress intended for those notices to be exempt from the Act's protections. Similarly, no less than other debt collection activities covered by the FDCPA, subsequent communications in the context of non-

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[4] Significantly, the principal Senate report clarified that the definition of "debt collector" does not cover "the collection of debts, such as mortgages and student loans, *by persons who originated such loans*." S. Rep. No. 95-382, at 1648 (1977) (emphasis added). Likewise, the report clarified that the definition does not cover "mortgage service companies and others who service outstanding debts for others, *so long as the debts were not in default when taken for servicing*." *Id.* (emphasis added). There would have been no reason to include those limitations if the FDCPA did not cover mortgage collection at all.

judicial foreclosure could run afoul of the Act's prohibitions, and again nothing in the text, structure, or purpose of the FDCPA suggests that Congress intended for non-judicial foreclosure to be exempt from the Act's protections.

In fact, studies have found that deceptive practices in foreclosures are extremely common. *See* John W. Schoen, *Homeowners Battle Banks To Stop Foreclosures . . . and Win*, NBC News (Nov. 2, 2015, 3:30 PM ET), https://www.nbcnews.com/business/economy/homeowners-battle-banks-stop-foreclosures-win-flna403572. According to a National Consumer Law Center study, for example, "in more than 80 percent of the cases, the lender scheduled a foreclosure sale while processing a loan modification. In four out of five cases . . . lenders failed to properly credit payments or wrongly claimed homeowners owed bogus fees." *Id.* Thus, exempting non-judicial foreclosure from the Act's protections would do exactly what Congress adopted the law to prevent, leaving "consumers vulnerable to harmful collection tactics as they fight to save their homes from foreclosure." Consumer Financial Protection Bureau, *Fair Debt Collection Practices Act: CFPB Annual Report 2013*, at 27 (Mar. 20, 2013), https://files.consumerfinance.gov/f/201303_cfpb_March_FDCPA_Report1.pdf.

Furthermore, applying the FDCPA's requirements to trustees engaging in non-judicial foreclosure would "insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." 15 U.S.C. § 1692(e). After all, the FDCPA does not prevent debt collection; it simply requires debt collectors to refrain from engaging in false, deceptive, harassing, and abusive conduct in doing so. Indeed, even if a consumer notifies a debt collector that the consumer refuses to pay and wishes the

debt collector to cease further communication pursuant to 15 U.S.C. § 1692c(c), the debt collector can still "notify the consumer that the debt collector or creditor intends to invoke a specified remedy," *id.* § 1692c(c)(3), like non-judicial foreclosure. Thus, applying the Act's requirements to non-judicial foreclosure would ensure that all trustees who initiate foreclosure are held to the same standard, and that those who abide by the Act's requirements are not competitively disadvantaged.

In fact, preventing false, misleading, and harassing debt collection practices is even more necessary to furthering the Act's goals in the context of non-judicial foreclosure than it is in other contexts. Consumers are often "rooted in the house where they are raising their children, the neighborhood where they have found a sense of belonging, or a home they built," and "[t]hese familial or emotional attachments to a home can be of overwhelming importance to borrowers." Prentiss Cox, *Foreclosure Reform Amid Mortgage Lending Turmoil: A Public Purpose Approach*, 45 Hous. L. Rev. 683, 711 (2008); *see* Marshall, *supra*, at 1286 ("Homeownership is often central to an individual's social identity," and the loss of a home can have "damaging effects."); Pet'r Br. 23 ("A family's home is typically its most important asset. It is where children are raised, and communities are formed."). Debtors can therefore be particularly susceptible to abusive collection practices when their home is at risk of foreclosure. Marshall, *supra*, at 1287. At the same time, "[i]nvestors and commercial borrowers . . . typically [do] not . . . have such attachments, but rather . . . treat their decisions in foreclosure solely as a matter of financial interest." Cox, *supra*, at 711. This mismatch of incentives could lead to more predatory behavior during foreclosures than during other types of debt collection.

Some courts have suggested the drafters of the FDCPA did not intend for the Act to apply to actions liquidating property because, in their view, secured debt is different than other types of debt in which debtors have no ability to pay due to "misfortune." *See Montgomery v. Huntington Bank*, 346 F.3d 693, 700 (6th Cir. 2003); *Jordan v. Kent Recovery Servs., Inc.*, 731 F. Supp. 652, 658 (D. Del. 1990) ("[a]ny failure to return the property to the rightful owner occurs not through misfortune but through a deliberate decision by the present possessor to avoid returning the property"). These courts fail to appreciate the misfortunes that can cause individuals to default on secured debts, especially home mortgages. Just like debtors defaulting on unsecured debts, home mortgagors often become unable to pay their mortgages due to uncontrollable circumstances like "job loss and reduced income, . . . divorce, . . . illness," and other financial problems. Cox, *supra*, at 708. Moreover, it is not always simple to return a home to a creditor once a borrower has created a life and raised a family in that home. *See supra* at 14. Borrowers in foreclosure are also "more likely to have gotten an unfair or predatory loan." Cox, *supra*, at 709. Thus, Congress's plan in passing the FDCPA—to protect consumers who cannot pay their debts due to "unforeseen event[s] such as unemployment, overextension, serious illness, or marital difficulties or divorce," S. Rep. No. 95-382, at 1697 (1977)—applies just as strongly in the context of secured debts like home mortgages as it does in the context of other debts.[5]

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[5] Moreover, characterizing a borrower's challenge to a foreclosure as "a deliberate decision by the present possessor to avoid returning the property," *Jordan*, 731 F. Supp. at 658, ignores the possibility that a foreclosure may be unnecessary or improper, or that a borrower might ultimately be able to pay back the unpaid debt in order to retain the disputed property. Indeed, in 2017,

Finally, the large number of foreclosures that occurred during the subprime mortgage crisis of 2007 and 2008 underscores the importance of the FDCPA's protections in the foreclosure context. In 2008, one in every fifty-four households received a notice of foreclosure, Les Christie, *Foreclosures up a Record 81% in 2008*, CNNMoney (Jan. 15, 2009, 3:48 AM ET), https://money.cnn.com/2009/01/15/real_estate/millions_in_foreclosure/, and in 2009, a record number of homes entered foreclosure, Les Christie, *Record 3 Million Households Hit with Foreclosure in 2009*, CNNMoney (Jan. 14, 2010, 6:07 AM ET), https://money.cnn.com/2010/01/14/real_estate/record_foreclosure_year/. Since the 2007-2008 financial crisis, foreclosure rates have remained high. In the last year alone, foreclosure starts increased in 44 percent of U.S. markets. *See Study: Foreclosure Rising in 44% of Metros*, Realtor Magazine (Aug. 21, 2018), https://magazine.realtor/daily-news/2018/08/21/study-foreclosures-rising-in-44-of-metros.[6] It runs contrary

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71% of foreclosures in Colorado were withdrawn before sale, whether due to loan modifications, cured defaults, or other reasons. *See 2017 Statewide Pub. Tr. Statistics*, Colorado County Treasurers & Public Trustees (Feb. 16, 2018, 15:00), https://tinyurl.com/2017-colo-stats.

[6] Moreover, as the 2008 financial crisis demonstrated, foreclosure can have ripple effects throughout the economy, affecting consumers far beyond the particular debtor facing the loss of his or her home. *See* G. Thomas Kingsley, Robin Smith, & David Price, *The Impacts of Foreclosure on Families and Communities*, The Urban Institute (May 2009), https://www.urban.org/sites/default/files/publication/30426/411909-The-Impacts-of-Foreclosures-on-Families-and-Communities.pdf (foreclosures can lead to declining property values, crime, social disorder, population turnover, and local government fiscal stress). It is therefore especially important that the protections of the FDCPA be applied to non-judicial foreclosures, consistent with Congress's plan in passing the law.

to Congress's legislative plan to exempt such a large part of the debt-related market from the FDCPA's protections.

III. APPLYING THE FDCPA'S REQUIREMENTS TO NON-JUDICIAL FORECLOSURES WOULD NOT UNDERMINE STATE FORECLOSURE PROTECTIONS.

1. Lastly, some courts have suggested that treating non-judicial foreclosure as debt collection would create conflicts between the FDCPA and state mortgage foreclosure laws. This is wrong, and it would not, in any event, provide a basis for interpreting the FDCPA in a manner inconsistent with the statute's text and Congress's plan in passing it.

For example, according to the court below, holding that non-judicial foreclosure is debt collection could cause the FDCPA to conflict with Colorado law. Unlike most states, Colorado requires trustees representing a foreclosing party to file a motion under Rule 120 of the Colorado Rules of Civil Procedure asking a court for an order authorizing the foreclosure sale by a public trustee even in a technically non-judicial foreclosure. Colo. R. Civ. P. 120(a). In connection with this proceeding, those who file Rule 120 motions to authorize a sale are required to list the name and address of "persons who appear to have an interest in such real property" or "persons whose interest in the real property may otherwise be affected by the foreclosure." *Id.* 120(a)(1)(B)(iv)-(v). The provision then says that "[i]n describing and giving notice to persons who appear to have acquired a record interest in real property, the address of each such person shall be the address that is given in the recorded instrument evidencing such person's interest." *Id.* 120(a)(1)(C). The court below believed that this provision was inconsistent with the FDCPA's prohibition on communications with third

parties about a consumer debt. *See* 15 U.S.C. § 1692c(b).

Even assuming Rule 120's oblique reference to "giving notice" is, in fact, a requirement that notice be given, the FDCPA expressly permits communications with many of the persons to whom any notice might be sent—the "consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector," *id.* Thus, with respect to at least some entities that might have an interest in a property, there is plainly no conflict at all. The FDCPA also specifically permits communications regarding a debt to third parties with "the express permission of a court of competent jurisdiction," *id.*, which means a foreclosing party could simply ask the Colorado district court in which the party files its Rule 120 motion for permission to contact persons with a record interest in the property.

The court below also concluded that there was a conflict between Colorado's rule requiring a foreclosing entity to mail notice to a mortgagor, Colo. R. Civ. P. 120(b), and the FDCPA's requirement that a debt collector cease all communications with a borrower when the collector knows the borrower is represented by an attorney, 15 U.S.C. § 1692c(a)(2). But there is no conflict here. First, the FDCPA provision includes a caveat that permits communications with a consumer with "the prior consent of the consumer," *id.* § 1692c(a), so creditors may simply obtain the debtor's consent in the original loan documents. This is a relatively easy task, given that mortgage loans usually involve "'take it or leave it' form[s] to the terms of which the borrower must agree if he or she wants a loan," *Ho*, 858 F.3d at 588 (Korman, D.J., dissenting in part and concurring in part). Second, Colorado courts could (and likely would) read Colo. R. Civ. P. 120(b)(4)(A)—

the requirement that notice be sent "to each person named in the motion . . . at that person's address or addresses stated in the motion"—to permit mailing that notice to a person's attorney in order to avoid any conflict with the FDCPA. Indeed, the comments to Rule 120 specifically "recommend[] that a person acting as a debt collector in a matter covered by the provisions of the Federal 'Fair Debt Collection Practices Act' be aware of the potential applicability of the Act and comply with it, notwithstanding any provision of this Rule." Colo. R. Civ. P. 120, Committee Comment to 1989 Amendment.

Citing another potential conflict, the Ninth Circuit—in its decision refusing to treat non-judicial foreclosure as debt collection—mentioned 15 U.S.C. § 1692g(b), an FDCPA provision requiring debt collectors to cease collection following a debtor's dispute until they obtain verification of the debt or the name and address of the original creditor and mail it to the consumer. *Ho*, 858 F.3d at 575 (majority opinion). The Ninth Circuit suggested that a consumer triggering this provision could cause a foreclosing party to be unable to meet the requirements of Cal. Civ. Code § 2924b(b)(1), which requires trustees to mail a copy of the notice of default within ten business days after recording it. *See Ho*, 858 F.3d at 575. But, again, there is no conflict here. A debt collector would simply need to provide a debtor with verification of the debt—a simple task that would require, at most, that the debtor be provided with proof that a debt is owed and the name and address of the original creditor, *see, e.g.*, *Clark v. Cap. Credit & Coll. Servs., Inc.*, 460 F.3d 1162, 1173-74 (9th Cir. 2006)—within that ten-business-day period. Indeed, if debt collectors understand that the FDCPA applies to foreclosures, they will likely institute processes so that they have the information they

need to verify a debt before recording a notice of default.

Moreover, practical experience for more than a decade has demonstrated that the FDCPA and state laws can easily coexist. The Third, Fourth, and Sixth Circuits, along with the Alaska and Colorado Supreme Courts, have all held that non-judicial foreclosure proceedings are debt collection and thus covered by the Act. *See Kaymark v. Bank of Am., N.A.*, 783 F.3d 168, 179 (3d Cir. 2015); *Wilson*, 443 F.3d at 376-77; *Glazer*, 704 F.3d at 461-63; *Ala. Tr., LLC v. Ambridge*, 372 P.3d 207, 213-18 (Alaska 2016); *Shapiro*, 823 P.2d at 123-24. Many states within these jurisdictions have foreclosure notice requirements similar to Colorado's, requiring notice to third parties and requiring direct communications to a borrower even if he or she is represented by an attorney. *See, e.g.*, Va. Code Ann. § 55-59.1 (West 2018) (requiring notice "by personal delivery or by mail to . . . the present owner of the property to be sold at his last known address," "subordinate lienholder[s]," "any assignee of such a note secured by a deed of trust," "any condominium unit owners' association that has filed a lien," and others); 35 Pa. Stat. Ann. § 1680.403c (West 2008) (requiring that notice be sent to a "mortgagor at his or her last known address"); N.C. Gen. Stat. Ann. §§ 45-102–45-103 (West 2012) (requiring servicers to "send written notice by mail to the last known address of the borrower" and to file information about the debt and borrower with the Administrative Office of the Courts); W. Va. Code Ann. § 38-1-4 (West 2018) (requiring publication of notice "as a Class II legal advertisement" in "the county where the property is located," and requiring notice be sent to subordinate lienholders). Despite the concerns expressed by the court below, there has been no "evidence that these holdings [of the Third, Fourth, and

Sixth Circuits] have had any effect—much less that the sky has fallen in—on the foreclosure laws of those states," *Ho*, 858 F.3d at 588 (Korman, D.J., dissenting in part and concurring in part). Similarly, the FDCPA can be read to permit the continued operation of other state foreclosure laws. *Cf. Heintz*, 514 U.S. at 296-97 (concluding that "it is easier to read § 1692c(c) as containing some additional, implicit, exception than to believe that Congress intended, silently and implicitly, to create a far broader exception, for all litigating attorneys, from the Act itself").

2. Even if there were an irreconcilable conflict between the FDCPA and a state foreclosure law, the FDCPA explicitly preempts state law in that rare circumstance. The Act's preemption clause leaves in place "the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of [the FDCPA], and then only to the extent of the inconsistency." 15 U.S.C. § 1692n. The FDCPA also makes clear that "a State law is not inconsistent with [the FDCPA] if the protection such law affords any consumer is greater than the protection provided by [the FDCPA]," *id.*, thereby expressly allowing states to go above and beyond the FDCPA's requirements and provide greater protections to their residents.

It would be particularly strange to refuse to apply the FDCPA's restrictions to non-judicial foreclosure because of a conflict with state law given that Congress's original purpose in passing the FDCPA was to protect consumers where states were *failing* to do so. As Representative Annunzio explained when he introduced the bill, at the time there was "no effective debt collection regulation or law in 25 States, leaving over 80 million people completely unprotected from the demeaning and threatening techniques practiced by

some collectors." 122 Cong. Rec. H7177 (daily ed. July 1, 1976). Senator Biden similarly discussed how "[s]tates have failed to provide adequate protection in this area." 122 Cong. Rec. S16273 (daily ed. Sept. 21, 1976). In fact, many states at the time regulated debt collection through licensing boards that consisted mostly of other debt collectors. 123 Cong. Rec. S3484 (daily ed. Mar. 4, 1977). In short, Congress passed the FDCPA because of a "lack of meaningful legislation on the State level" to provide "effective protection . . . from debt collection abuse." S. Rep. No. 95-382, at 1696-97 (1977). To turn around now and limit the Act's reach because of a purported conflict with state law would be contrary to Congress's plan in passing the law.

Furthermore, Congress passed the FDCPA "to promote *consistent* State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e) (emphasis added). For that reason, it "enacted the FDCPA despite the fact that some states already had procedural requirements for debt collectors . . . in place, because it 'decided to protect consumers who owe money by adopting a *different, and in part more stringent, set of requirements* that would constitute *minimum national standards* for debt collection practices.'" *Piper*, 396 F.3d at 236 n.11 (quoting *Romea v. Heiberger & Assocs.*, 163 F.3d 111, 118 (2d Cir. 1998)) (emphasis added). Given Congress's plan that there be consistent protections for consumers across states, it makes little sense to undermine the Act's protections by exempting a large swath of debt collectors simply because of possible conflicts with state foreclosure laws. Congress passed the FDCPA so that it—and not state laws—would establish the national floor for restrictions on *all* debt collectors. States can, of course, go above this floor and enact even more stringent

restrictions on debt collection, as the FDCPA itself makes clear.

Finally, the FDCPA also contains a mechanism for exempting certain debt collection practices from the Act's requirements when state laws are sufficiently protective of consumers. That provision states that the Consumer Financial Protection Bureau (and before it, the Federal Trade Commission) "shall by regulation exempt from the requirements of this subchapter any class of debt collection practices within any State if the Bureau determines that under the law of that State that class of debt collection practices is subject to requirements substantially similar to those imposed by this subchapter, and that there is adequate provision for enforcement." 15 U.S.C. § 1692o. Thus, to the extent the Act truly is irreconcilable with state laws that provide similar levels of protection to debtors facing non-judicial foreclosures, the Bureau can—indeed must—provide exemptions from the Act's requirements. *See, e.g.*, *FTC Notice of Maine Exemption From The Fair Debt Collection Practices Act*, 60 Fed. Reg. 66972, 66973 (Dec. 27, 1995) (granting Maine's request for an exemption from certain FDCPA provisions because "the level of protection to consumers under the Maine Act is substantially equivalent to that provided in the FDCPA").

In short, there is no conflict between state foreclosure laws and the FDCPA, and even if there were, the FDCPA expressly preempts inconsistent state laws and provides a mechanism to exempt certain of its requirements in states that provide adequate, alternative protections. Thus, purported conflicts with state law provide no reason to interpret the Act in a manner that is inconsistent with its text and Congress's plan in passing it.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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September 17, 2018

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APPENDIX:
LIST OF *AMICI*

U.S. Senate

Brown, Sherrod
Senator of Ohio

Reed, Jack
Senator of Rhode Island

Warren, Elizabeth
Senator of Massachusetts

Whitehouse, Sheldon
Senator of Rhode Island

U.S. House of Representatives

Waters, Maxine
Representative of California

Cleaver, Emanuel
Representative of Missouri

Lynch, Stephen F.
Representative of Massachusetts

Maloney, Carolyn B.
Representative of New York

Velázquez, Nydia M.
Representative of New York